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SUBJECT: PRC ANTIMONOPOLY LAW'S FIRST YEAR LEAVES KEY CONCERN^S UNANSWERED

REF: A. A: BEIJING 702
[¶](#)B. B: BEIJING 2181
[¶](#)C. C: BEIJING 2136
[¶](#)D. D: BEIJING 1602

Classified By: Economic Minister Counselor William Weinstein, for reasons 1.4, b, d

[¶](#)11. (C) Summary: The competition regime established by China's year-old anti-monopoly law (AML) is still plagued by incomplete implementing rules, a lack of decision-making transparency, a perceived reluctance to take on powerful state-owned enterprises (SOEs), and potential jurisdictional confusion. China's AML agencies have been working on guidelines and rules to refine the terms of enforcement, mechanisms of cooperation, and substantive definitions as outlined in the text of the AML, but domestic and foreign critics are more worried about the politics of protectionism and a reluctance to tackle SOE monopolies. Chinese authorities are actively drawing upon the experiences of their international (including U.S.) counterparts, but still bar foreign attorneys from representing companies before AML authorities. End summary.

[¶](#)12. (SBU) Background: China divides AML enforcement between three agencies: the Ministry of Commerce (MOFCOM) is responsible for merger review; the National Development and Reform Commission (NDRC) is responsible for all price-related anti-competitive behavior; and the State Administration for Industry and Commerce (SAIC) oversees all non-price related anti-competitive behavior. Sitting a level higher is the State Council's Anti-Monopoly Commission (AMC), chaired by Vice Premier Wang Qishan, which coordinates and provides guidance to the three competition authorities. MOFCOM's decision to block the proposed Coca-Cola takeover of Huiyuan subjected the AML to a high degree of domestic and international scrutiny (ref A). End Background.

Implementing Rules a Work in Progress

[¶](#)13. (U) Over the past year, MOFCOM, SAIC, and NDRC have all issued multiple guidelines to clarify AML definitions and procedures, though to date these have only covered a portion of the areas of ongoing concern to enterprises and law firms. In June, SAIC issued two sets of AML rules on 1) monopoly agreements and abuses of market dominance and 2) abuse of administrative powers that outlined the procedures SAIC and its provincial-level branches will follow when investigating and handling non-price related anti-competitive behavior. Although the new rules further elucidate some of the AML's initially vague provisions, lawyers at a July 2 American Chamber of Commerce breakfast with Federal Trade Commission Commissioner William Kovacic complained the explanations still fall short. For example, it is not clear whether SAIC or its provincial offices must obtain approval from, or

merely notify, the State Council AMC regarding proposed decisions.

¶4. (U) MOFCOM has also released new merger and market definition guidelines. Affected enterprises and law firms are nevertheless still confused about vague and overly broad notification procedures, excessive documentation requirements, and MOFCOM's overly wide latitude to halt reviews due to what it deems incomplete notification packages. Other unresolved merger guideline ambiguities include, inter alia: the definition of "control;" whether a notification can be filed based on a letter of intent, or only on a binding agreement; and the standards used to determine the confidentiality of materials submitted by parties to MOFCOM.

¶5. (SBU) On August 17, 2009, MOFCOM announced it was drafting a number of new rules, including Measures for the Application Filing on Concentration of Undertakings, Measures for the Review of Concentration of Undertakings, and The Operating Procedures for the Review of Concentration of Undertakings. These new rules may help to address some unresolved ambiguities.

¶6. (U) NDRC also recently issued draft rules on monopoly prices covering companies, government agencies and industry associations. In an online statement, NDRC said the rules, open for public comment until September 6, would extend to instances of price collusion overseas if the collusion had an impact on China's domestic market. Given the tense negotiations between Chinese steelmakers and foreign iron ore suppliers, there has been much speculation that the planned

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joint venture between Australian mining giants Rio Tinto and Bhp Billiton would be an early potential target.

Buck stops where? Coke Case Muddies the Water

¶7. (C) The division of AML enforcement responsibility among MOFCOM, NDRC, and SAIC has raised questions about which agency will handle cases that fall between their vaguely defined jurisdictions, and whether decisions are really made above the ministerial level altogether. During a July 13 meeting with Econoff, Owen Ma of Pepsico said MOFCOM had been poised to approve Coca-Cola's proposed takeover of Huiyuan and had so informed the two companies. However, Ma claimed, the merger was eventually rejected at the behest of State Council leaders, though it remains unclear if they exercised their influence via formal MOFCOM or AMC decision-making processes or indirectly. Ma remarked that "in China, no one wants to take credit for a decision." (Note: see ref A for more on the Coke-Huiyuan deal. End note). The division between price-related anti-competitive behavior, which falls under NDRC's jurisdiction, and non-price related behavior, which SAIC oversees, is similarly blurry, despite assurances (see ref B) from both that they have "good and smooth coordination."

¶8. (U) Another wild card is what role the courts will play in interpreting the law. In China's legal system, culpability is usually determined at the administrative rather than the judicial level. However, Chinese courts will still have to handle appeals of administrative decisions that will require them to interpret the law. It remains to be seen if court rulings will controvert the approach taken by administrative agencies.

Protectionism in Disguise?

¶9. (C) MOFCOM is obliged to publish only prohibition and conditional clearance decisions, of which there have been three since the AML took effect. These published decisions are short and lack the degree of economic analysis available in EU and U.S. decisions, frustrating companies and lawyers

alike with the lack of guidance they provide. The opaque decision-making process has also fueled speculation that China may be using the AML as a protectionist tool. A July-August China Business Review article claims that the three published merger decisions (InBev/Anheuser-Busch; Coca-Cola/Huiyuan; Mitsubishi/Lucite) had "reinforced the notion that MOFCOM may use the AML to achieve goals unrelated to competition law." And as reported in ref A, MOFCOM's rejection of the proposed Coca-Cola/Huiyuan merger set off a storm of controversy over whether the decision was aimed more at appeasing economic nationalism than safeguarding consumer welfare. At a July 3-4 international symposium on competition law held in Beijing, a MOFCOM official expressed his frustration with the media coverage of the Coca Cola/Huiyuan case, saying his bureau had been unfairly accused of protectionism when in fact it had employed objective legal and economic analysis. But others acknowledged the government's traditional aversion to providing public explanations, as well as the fact that the AML does not mandate extensive publication. Interestingly, MOFCOM's April 24 published opinion on the Mitsubishi/Lucite case (issued only one month after the March 18 Coca Cola opinion) provides much more detail than previous ones.

Petty Corruption at Local Level

¶10. (C) Pepsico's Ma asserted to Econoff that the biggest problem related to possible abuse of the AML did not come from national competition authorities based in Beijing, but from their provincial and municipal branch offices, who tend to use AML provisions to block businesses without a sound legal basis. Most firms do not want to antagonize these authorities and so agree to pay off officials instead of fighting the matter in court. Ma cited a case in which local SAIC officials assessed a 200,000 RMB fine on a supermarket for allegedly violating the AML; after negotiating, the supermarket agreed to pay the officials 10,000 RMB.

Turning a Blind Eye on State Monopolies

¶11. (U) While the AML sanctions the existence of state monopolies, it prohibits the abuse of administrative power and requires SOEs to file the same pre-merger notifications that other firms do, at least on paper. The gap between the

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law and its implementation with regard to SOEs is gaping, however, and another target of harsh criticism. An early indicator was the October 2008 merger between China Unicom and Netcom, which was not notified to MOFCOM yet did not appear to trigger penalties for the involved firms.

¶12. (U) A scathing August 24 article in the China Industrial Economic News (affiliated with the Communist Youth League) quoted Professor Wang Xiaoye from the China Academy of Social Sciences (who had been a consultant to the AML drafting committee) lambasting the "totally unsatisfactory performance" of AML implementation, citing the failure to go after rampant anti-competitive behavior like the collusive hike in fare prices that China's large domestic airlines seem to have coordinated in April and the myriad other instances of SOEs abusing their market dominance to raise prices. Wang was further quoted as saying that as long as the AML was not applied to SOEs, its authority would be "shaken." The article noted the failure to date of every single attempt by consumers to use the AML to challenge monopolistic prices being charged for gasoline, electricity, telecoms, train fares, and product quality certification. Professor Guo Tianyong of the Central Finance and Economics University was quoted as saying that public hearings organized by relevant ministries on public utility pricing would never be as effective as breaking up administrative monopolies, lowering market access barriers, and thus introducing real competition in this and other sectors.

¶13. (C) Professor Allen Fels, Dean of the Australia and New Zealand School of Government and a participant at the July symposium mention in para 9, summed up this problem somewhat more dispassionately, noting the conceptual problem of "a government applying a sanction against itself and finding that it has acted unlawfully."

Monopoly on Anti-Monopoly Legal Services

¶14. (C) Chinese law firms are the only entities permitted to represent companies before China's competition authorities. Senior Competition Counsel for Google Julia Holtz told EconOff that these firms "created significant friction in the process" as they are often more interested in "cashing in" than in learning competition law, which was a new subject for Chinese attorneys. Holtz said that, in many instances, Chinese firms were unable to manage the AML legal process effectively, while Western law firms with relevant experience were not even allowed to attend meetings or make phone calls. She said that many companies hire both Western and Chinese law firms, the former to provide technical assistance and legal analysis, and the latter to provide access to competition authorities. She complained that this resulted in a waste of both time and money for companies required to undergo review by one of the AML enforcement agencies.

Comment

¶15. (C) The technical concerns about Chinese implementation of the AML will continue to cause confusion in the short-term, but over time will be mitigated as more rules, guidance, and case decisions by the three agencies and even the courts provide greater clarity. The real worry is whether China's top leaders intend to use the law to benefit consumers, or instead, as the evidence to date would suggest, as a tool for advancing various political interests, like giving favored SOEs another advantage over their competitors. A single year is not enough to render a definitive verdict - Chinese regulators are still getting their sea legs and expectations that they would be able and ready to take on China's most powerful vested interests right off the bat were not realistic to begin with. And there are positive pressures at work, such as the intense and often critical domestic media coverage of competition issues, a declared (but as yet unrealized) State Council policy of breaking up administrative monopolies (ref D), and the fact that more Chinese companies investing abroad are being subjected to other countries' antitrust laws. One lever that the USG should continue to employ to influence positively China's competition policy practices is the TDA-funded capacity building program and other bilateral exchanges that impart U.S. experience and best practices to China's enforcement agencies, judges, and other stakeholder audiences.

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